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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 814 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

GUNVANTLAL MANSUKHLAL THAKKAR

Appearance:

Ms. Kathaben Gajjar Asst. PUBLIC PROSECUTOR for Petitioner

MR DK MODI for Respondent No. 1 to 8

MR PC KAVINA for Respondent No. 9

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 11/02/2000

C.A.V.JUDGEMENT

#. This is an appeal under section 378(1) of the Criminal Procedure Code, 1973 (for short the Cr.P.C.) filed by the State Government challenging the order of

acquittal passed by the learned Chief Judicial Magistrate Nadiad by his Judgment Exh. 82 dated 29-5-1991 in Criminal Case No. 35 of 1987 which was pending before him.

#. In this appeal the respondents were the accused before the trial Court. For the sake of convenience, the parties will hereinafter be referred to as per parties before the trial court.

#. As per case of prosecution, accused No.1 is a partnership firm and accused nos. 2 to 7 are the partners in that partnership firm. Accused No. 8 was a person who in fact sold the article of jaggery powder to Food Inspector and therefore he is a vendor. Accused No. 9, is a partnership firm of which partners are not joined as accused in the case before the trial court. To understand the case of the accused No. 9 it is necessary to know about the proceedings initiated in this High Court by one Shri Rajeshbhai H. Shah for and on behalf of the partners of the firm which runs in the name and style of Shah Agencies, i.e., accused No. 9. Originally the Food Inspector who lodged the complaint against present respondents had cited all responsible partners of M/s. Shah Agencies as accused No. 10. Shri Rajeshbhai H. Shah filed one Criminal Miscellaneous Application No. 1475 of 1989 in this High Court with a request to quash the proceeding against accused No.10. On 26.07.1989 this Court (Coram : B.S. Kapadia, J) was pleased to allow that application and quashed the proceeding against the partners of M/s. Shah Agencies, i.e. accused No. 10 in Criminal Case No. 35 of 1987 pending in the Court of learned Chief Judicial Magistrate, Nadiad.

Thereafter, the learned Chief Judicial Magistrate passed an order dated 25-9-1989 below application Exh.14 presented by learned advocate for accused No. 9 and by

passing a judicial order below said application, Exh. 14, the learned Chief Judicial Magistrate directed the Food Inspector to implead a nominee in the matter for trial according to law and also to keep present that nominee duly appointed by the firm before the court on 21-10-1989. Being aggrieved against and dissatisfied with the said order dated 25-9-1989 the accused No.9 filed Criminal Miscellaneous Application No. 2224 of 1989 in this High Court and in that matter this Court (Coram : J.U.Mehta, J) by its order dated 19-12-1989 quashed and set aside the order dated 25-9-1989 below Exh. 14 in Criminal Case No. 35 of 1987 and therefore, now accused No.9 being a partnership firm is one of the

respondents in this case. Its none of the partners as accused are there on record.

#. The facts leading to this appeal in a nut shell are as follows:-

On or about 9-9-1986 at about 4.30 p.m., the complainant in company of one another Food Inspector Shri Hiralal B. Panchal and Peon Ghanshyambhai Barot visited the shop of accused No.1 which is a partnership firm. It is the case of the prosecution that accused No.1 is a partnership firm which carries on the business of jaggery and jaggery powder. As alleged in the complaint, accused No. 2 to 7 are the partners in accused No.1 firm and accused No. 8 is doing the work of selling goods for and on behalf of partners of the firm. As alleged in the complaint, accused No. 8 is the father of accused No. 4. The Food Inspector collected a sample of jaggery powder from accused No. 8 as per the procedure laid down

in the Prevention of Food Adulteration Act, 1954 (for short, the Act) and the Rules framed thereunder. As per the case of the prosecution when the Food Inspector visited the shop of accused No. 1 there were about 124 lumps (packings) of jaggery which were found in packed and sealed condition and from that stock of jaggery, sample was taken by the Food Inspector in presence of Panch witness under a panchnama. That sample was purchased for the purpose of analysis. That sample was sent to Public Analyst and ultimately the Public Analyst gave a report that jaggery powder was adulterated as per definition of "adulterated" as defined under Section 2(i-a) of the Act. Thereafter, a written consent was obtained from the Local Health Authority and on 15-12-1987, the Food Inspector lodged a private complaint in the Court of the Chief Judicial Magistrate, Nadiad against all the accused nos. 1 to 10. The complainant led his oral evidence as well as documentary evidence in support of his case and after appreciation of evidence on record, the learned Chief Judicial Magistrate by rendering his judgment Exh. 82 dated 29-5-1991 acquitted all the accused. Being aggrieved against and dissatisfied with the said order of acquittal, the State Government has preferred this present appeal.

#. This court has perused the whole record of the case of the trial court and heard the arguments of the learned APP for the appellant and Shri D.K.Modi, L.A. for respondents nos. 1 to 8 and Shri P.C. Kavina, L.A. for respondent No.9.

#. In the present case sample of jaggery powder in question was in fact taken from accused No. 8 who was present in the shop when Food Inspector visited that shop. Accused No. 8 is neither a partner nor a nominee of accused No.1. From panchnama Exh. 48 it appears that accused No. 8 Shri Jayantibhai Maganbhai Shah was questioned by the Food Inspector and in reply to that question accused No. 8 replied that his son Mukesh Jayantilal Shah (respondent No.4) was a partner in the firm, i.e. accused No.1, and that he (accused No.8) was serving in one another firm named M/s. Shah Dahyalal Maganlal. The prosecution has not led any evidence to connect accused No. 8 with the firm i.e. accused No.1. The prosecution has not led any evidence to show that accused No. 2 to 7, are the partners in firm accused No.1. For a moment if it is believed that accused nos. 2 to 7 are partners in firm accused No.1, then prosecution must further prove that accused nos. 2 to 7 being the partners of the firm were in charge of, and responsible to the firm-accused No.1 for the conduct of business of firm. In the present case prosecution has not led any evidence of partnership deed to show that accused nos. 2 to 7 are partners in the firm. To fasten the liability on accused nos. 2 to 7 the complainant has deposed in his evidence that accused nos. 2 to 8 are the partners. Except his bare word no other evidence has been led by the prosecution. Shri D.K.Modi has cited an authority Shri Rajendra v. State of Madhya Pradesh 1991 Vol. 2 Prevention of Food Adulteration cases, Page 1. In this cited case the Apex court has observed that even if the Food Inspector is believed that a particular appellant told him that the business on the shop was

being run in partnership, that per se was not enough to inculpate remaining two appellants without further evidence. He has pressed into service one another case of Smt. Manibai and another v. The State of Maharashtra 1951-74 SC 11 of Supreme Court on Prevention of Food Adulteration cases. The Apex Court has held that if the business is owned by a firm or an association of individuals, partner can be made liable only if it is shown that he was in charge of and was responsible for the conduct of the business which was carried on and therefore by mere deposition of the Food Inspector that accused nos. 2 to 7 are the partners in a firm, it is not sufficient to hold accused nos. 2 to 7 criminally liable for the offences under the Act.

#. In the present case accused No. 8 had informed the Food Inspector that the goods from which sample was taken, was purchased from accused No.9 under bill No.

291 dated 4-9-1986. That bill is produced in the case at Exh. 41 and thus accused No. 1 to 7 have advanced their defence under section 19(2) of the Act. In the complaint the Food Inspector has mentioned the facts as if accused No. 9 was the supplier of the goods to accused No.1. Before framing of charge the complainant had led some evidence so as to enable the learned Chief Judicial Magistrate to frame a charge against the accused and on the basis of that pre-charge evidence, the learned Magistrate has framed charge at Exh. 69 in which a specific allegation is made against accused nos. 2 to 8 that they were the partners in accused No.1-firm and accused No. 9 was the manufacturer of goods of jaggery and on the basis of that charge, the trial court

proceeded further and ultimately trial ended in acquittal. In that charge Exh. 69, it is stated that sample of jaggery was sold by accused No.1. In fact it is not so, and therefore accused nos. 1 to 8 have advanced their defence keeping in mind the charge Exh. 69. On reading charge Exh. 69 when a specific case is put that accused No.1 sold the sample of jaggery then that case is not proved because whatever evidence is led, is to the effect that accused No. 8 sold that sample of jaggery for the purpose of analysis. So far as case as against accused nos. 2 to 8 is concerned, no evidence is led to prove the fact that they are the partners in the firm and in that way the case is not proved against accused No. 1 to 8.

#. As per the evidence led in the case an attempt has been made by accused nos. 1 to 8 that goods from which sample was taken was supplied by accused No. 9. As per the complaint, accused No. 9 supplied that goods to accused No. 1 and therefore at an initial stage it was the case of the prosecution that accused No. 9 was the supplier. On the contrary while framing the charge, specific case was put to accused No. 9 that it was a manufacturer of the jaggery goods. Still however, the accused nos. 1 to 8 have attempted to advance their defence under Section 19(2) of the Act on the basis of bill Exh. 41 alleged to have been issued by accused No. 9. If we minutely read the alleged bill Exh. 41, it becomes crystal clear that it is not a bill for the goods sold to accused No.1. It is merely a "statement of account" sent by Shah Agencies accused No. 9 to accused No.1. As stated in that statement of account, accused

No. 9 had purchased the goods mentioned in that statement of account, on account of and at the risk of accused No.1. The said goods were transferred by Lorry

No. GT J 617 from Salem to Nadiad. Some particulars are given in the said statement of account Exh. 41. In column of date, 14-9-1986 is written, bill No. 291 is written in second column and in the fourth vertical column of ` from whom purchased' it is written that Satya Traders, Salem 2 and therefore from this Exh. 41 it clearly appears that accused No. 9 purchased the goods jaggery for and on behalf of accused No.1 from Satya Traders and therefore accused No. 9 is merely a supplying agent of accused No.1. He acted as supplying agent for and on behalf of accused No.1 and that is why accused No. 9 has charged commission at the rate of 2% in said statement of account Exh. 41. As per the evidence, accused No. 1 and 9 entered into one agreement on 1-8-1985 and proposal was made by accused No. 1, that accused No. 9 will act as an agent to act as commission agent for accused No.1. On reading the terms and conditions of the said agreement dated 1-8-1985 which is at page 171 of original Record and Proceeding of the case, this court finds that accused No. 9 is neither a manufacturer nor a supplier of the goods. Accused No. 9 had acted as an agent for and on behalf of accused No.1. Material terms and conditions of that agreement are as follows:-

"1. We hereby confirm having appointed you as our Commission agent to purchase on our behalf and on our account and risk General Merchandice, Spices, Jaggery, Jaggery Powder provisions and

the like as we may require you to purchase on our behalf from time to time.

2. You will purchase the goods directed to be purchased either in your name or in our name, but always for and on our behalf. Directions will be given by us from time to time, either on postal intimation, telephonic intimation or otherwise on oral request.

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11. In consideration of your services to be rendered by you in acting as our purchasing Commission agent we shall give you a commission of 2% on the purchase price of the goods so purchased excluding the incidental costs of loading, transport, handling etc."

Therefore on reading this agreement together with alleged bill Exh. 41 this court finds that accused No. 9 acted as merely an agent in between the seller and the purchaser. As per Exh. 41 seller was Satya Traders and

the purchaser was accused No.1, and therefore in no case it can be said that accused No. 1 purchased the goods of jaggery from accused No. 9 under bill Exh. 41. In fact that Exh. 41 is not a bill. It is merely a statement of account giving information regarding supply of goods purchased from Satya Traders for and on behalf of accused No.1 and transported from Salem to Nadiad and for that services accused No. 9 had charged a commission at the rate of 2%, i.e. Rs.532/- from accused No.1. Under these circumstances, accused No. 9 cannot be said to be a manufacturer as alleged in the charge Exh. 69.

#. After arguing at length on above points, the learned A.P.P. for the State has limited her arguments only on the point of sanction because as per her arguments the learned Chief Judicial Magistrate has seriously erred in arriving at a decision that sanction is not legal and valid.

##. The ld. APP has argued that in view of decision in Harshvadan D. Sevak, Food Inspector v. Nareshbhai Devandas Vaghvani and Another 1991(2) GLH 615, there will be no need to record the reasons for granting consent in writing under Section 20 of the Act, and further that such a consent given without recording the reasons for the same is not rendered invalid nor the want of reasons will invite any adverse effect, and therefore the finding of the learned Magistrate on the point of written consent is not correct because the Local Health Authority is now not required to state the reasons for granting the written consent under section 20 of the Act.

Shri D.K.Modi, ld. advocate for Respondents nos. accused nos. 1 to 8 has fairly conceded to this court that he gives up that contention for rendering written consent as not legal and valid on the first ground of absence of reasons which ought to have been assigned by the Local Health Authority.

##. The second count on which the learned Magistrate has arrived at the decision that there was non-application of mind on the part of the Local Health Authority who issued a written consent and for that the

learned Chief Judicial Magistrate has observed in his judgment that in the present case written consent Exh. 54 is a cyclostyled form in which some gaps were there and that gaps were filled in, by writing in ink and therefore Local Health Authority has not applied his mind before granting legal consent, because there is no evidence on record as to who filled in that particulars

in ink, in that cyclostyled form of written consent Exh. 54.

##. In this case on hand, only one witness has been examined and that is Food Inspector Shri Vilaschandra D. Barot, at Exh. 38 and during the course of recording his evidence, he produced certain documents along with sanction Exh. 54. For this written consent Exh. 54, he has deposed in his evidence that after receipt of report of public analyst, he met the Local Health Authority before whom he produced all the documents including report of Public Analyst and thereafter Local Health Authority granted the written consent which is at Exh. 54. He has not uttered a single word in his evidence as to who was that Local Health Authority who granted Exh. 54. From the evidence it appears that he only tendered that document Exh. 54 in the case. To prove that document Exh. 54, he has not led any legal evidence in accordance with law. He does not know the name of the person who granted it. He has not deposed for Exh. 54 that it was prepared in his presence. He has not deposed that he recognised the signature of the local authority who signed it. He has not deposed that contents of that Exh. 54 were true and correct and therefore in absence of such evidence, Exh. 54 is merely a piece of paper

produced in the case without evidence to prove it and on the basis of that document Exh. 54, prosecution wants to advance the case that legal written consent as per Section 20 of the Act was granted before complaint was lodged.

##. Shri Modi has argued that looking to so called written consent Exh. 54, it is clear that it is a cyclostyled form in which name of Food Inspector, date of taking the sample, person from whom that sample was taken, and the names of persons for whom written consent was required, were filled in, and therefore it can safely be said that the Local Health Authority did not apply his mind before granting written consent. There is no evidence as to who prepared that consent and who signed it. It was the prime duty of the prosecution to prove this Exh. 54 in accordance with law even by examining the Local Health Authority, so far as the proof for contents of Exh. 54 is concerned. By mere tendering a document in the case it cannot be said that it is proved in accordance with law. One has to prove the correctness and trueness of the contents of the document. In absence of any evidence for proving the contents of Exh. 54 it cannot be said that this document is legally proved.

##. The learned Chief Judicial Magistrate has observed in paragraph 4 that complainant has not examined the Local Health Authority for Exh. 54 and during the course of arguments the learned advocate for accused No. 9, argued that Local Health Authority did not apply his mind before granting it, as reasons are not stated in it and it is not stated that it was granted in the public

interest. The learned Magistrate has assigned reasons for not believing that written consent as legal and valid. He has stated that Exh. 54 is in cyclostyled form in which blanks are filled-in by hand-written particulars.

##. Under the circumstances, when Exh. 54 is not duly proved and when it clearly appears that it is in a prepared cyclostyled form and relevant particulars were filled in, then it stands to reason that the Local Health Authority did not apply his mind before granting it.

##. Learned APP has cited the case of Triveni Dhar v. State of Uttar Pradesh 1998(2) Prevention of Food Adulteration case pg. 197 (Allahabad). In that case, complaint was printed and the sanction was typed. Looking to the facts and circumstances of that case the Allahabad High Court came to the conclusion that the mere fact that the form in which complaint made was printed and the sanction was also got typed is a matter of convenience and not of laxity and therefore sanction produced in that case was considered to be legal and valid.

##. The facts and circumstances of this case on hand are totally different than that of case of Triveni Dhar (supra). In that case sanctioned was a typed one and therefore before typing atleast someone must have applied his mind for preparing the draft of the sanction for getting it typed. In the instant case, in Exh. 54

certain gaps which were kept bank were filled-in with particulars in ink and therefore the case cited by the learned APP is not helpful to the appellant.

##. This court has come across a case of Nand Kishore and another v. State (Delhi Admn.) 1991(1) PFA cases 220. In that case there were same facts with regard to written consent. In that case written consent was prepared on a cyclostyled proforma wherein certain blanks had been filled in like the name of Food Inspector, the date of taking of sample and the name of accused etc. The Delhi High Court held that looking to such

cyclostyled sanction order it can be held that there had been no application of mind. In that case three similar type of Judgments of Delhi High Court were referred to. One is Ms. Shakun and another v. Delhi Administration, 1989 (1) FAC 387, second is State (Delhi Administration) v. Shyam Lal, 1987 (2) FAC 198 and third is case of R.N. Gujral and another v. Pritipal Gupta, 1988 (2) FAC 84. In case of Nand Kishore and another, the sanction order was a cyclostyled proforma, wherein only certain blanks had been filled in and the Delhi High Court has held that sanction was bad in law. Relying on that above decision this court also comes to a conclusion that sanction in this case, Exh. 54 is bad in law.

##. In view of the discussion made hereinabove, I am of the view that the learned Chief Judicial Magistrate has rightly come to a conclusion that the Local Health Authority who granted written consent Exh. 54 did not apply his mind, more particularly when there is no

evidence to prove that the contents of Exh. 54 are true and correct. Under the circumstances, this court finds no reason to disturb the finding of the learned Chief Judicial Magistrate on the point of sanction.

##. Except the above contentions no other contentions are taken by the learned APP for the State.

##. As per order dated 27.1.2000, the appeal as against Respondent No. 8 has been abated.

Under the circumstances, this appeal fails and is hereby dismissed confirming the order of acquittal passed by the learned Magistrate.

(H.H. Mehta, J)